

and so, finding myself in the same position as Murray-Aynsley C.J. in the first case cited above, I must allow this appeal. The conviction is accordingly quashed, the sentence set aside, the fine if paid to be refunded and the order of demolition revoked.

Appeal allowed.

Solicitors: *Jayadeva, Zahir & Ismi.*

TAN CHYE CHEW & ANOR. v. EASTERN MINING AND METALS CO. LTD.

[F.C. (Wee Chong Jin C.J. (Singapore), Wylie C.J. (Borneo) and Tan Ah Tah F.J.) November 19, 1964]

[Singapore — Federal Court Civil Appeal No. 6 of 1964]

Contract — Misrepresentation — Fraud — Onus of proof.

In this case the respondent had entered into two contracts, one with the first appellant for the assignment of rights to prospect certain mining land including in an approved application for prospecting permit and the second with the second appellant for the payment of commission for the second appellant's part in bringing about the first contract. It was alleged that the second appellant had shown to a geologist employed by the respondent some land which was later discovered not to be included in the approved application. The trial judge found that the second appellant, with the knowledge of the first appellant, had knowingly and deliberately shown the wrong area, that the second appellant was guilty of fraud and that as the second appellant was the agent of the first appellant, the first appellant was liable therefor. The appellants appealed against the decision of the trial judge.

Held: (1) a high standard of proof is required in cases where fraud is alleged;

(2) in this case there was insufficient evidence to support the finding of fraud against either appellant and consequently there can be no rescission on the ground of fraud and the award of damages for fraud should be set aside;

(3) the contracts entered into between the respondent company and the appellants were not voidable because of misrepresentation;

(4) the respondent company had not on the evidence proved that the second appellant was the agent of the first appellant in negotiating the contract.

Cases referred to:—

(1) *Nederlandsche Handel-Maatschappij N.V. v. Koh Kim Guan* [1959] M.L.J. 173.

(2) *Hornal v. Neuberger Products Ltd.* [1957] 1 Q.B. 247.

(3) *Bater v. Bater* [1951] P. 35.

FEDERAL COURT.

R. R. Chelliah for the 1st appellant.

Richard Talalla for the 2nd appellant.

P. J. Mooney for the respondent.

Wee Chong Jin C.J. (Singapore): Having arrived at the conclusion that I would allow the appeal of both appellants and before I have

A had the opportunity of setting out the reasons which led me to this conclusion I have had the advantage of reading the judgment of Wylie C.J. I find I am in such complete agreement with the reasoning by which he has arrived at the same result as mine that I propose merely to say that I agree with him that the appeal of both appellants should be allowed, the judgment of the court below should be set aside and judgment should be entered in favour of both appellants on all claims with costs both of the appeal and the court below.

C **Wylie C.J. (Borneo):** These proceedings have their origin in two contracts concluded one between the respondent and the first appellant and the other between the respondent and second appellant. The first contract provided for the assignment to the respondent of all the rights and interests of the first appellant under an agreement made between the latter and his nephew, one H. K. Loon. Under this agreement first appellant had acquired rights to prospect and mine certain land included in an approved application for a prospecting permit covering that land. The nephew was the applicant named in the approved application. Under the second contract the respondent agreed to make to the second appellant certain payments by way of commission for the latter's part in bringing about the first contract. In the course of negotiations, second appellant had shown to a geologist employed by respondent some land which, on the findings of the trial judge, second appellant had represented as being included in the approved application. The land appeared to the geologist to offer very good prospects. After the contract was concluded, the respondent's employees discovered that this land was not included in the approved application. Proceedings were then brought claiming damages from both appellants and there was included an allegation that second appellant had knowingly and fraudulently shown the geologist the wrong piece of land. The trial judge found that both appellants had acted fraudulently.

H The finding of the trial judge in which he accepted the evidence given by the witnesses for the plaintiff was not challenged. On the hearing of this appeal, thereof, it was common ground that the second appellant showed the plaintiff's employee, one Bush, the wrong piece of land — that is to say, a piece of land over which the first appellant had no mining rights, but over which the second appellant represented that the first appellant did have rights under an approved application which would (and in fact did) lead to the issue of a prospecting permit. The appellants, in their grounds of appeal, challenged the finding that the second appellant acted fraudulently in that he showed Bush this piece of land

knowing that it was not land included in the approved application, and this is the fundamental issue raised in this appeal. It was submitted that there was no evidence, or no sufficient evidence, to support this finding.

Before examining the evidence in relation to this submission, it is convenient to refer briefly to the standard of proof that is required when fraud is alleged in a civil action. This question is not referred to at all in the grounds of decision. In his closing address, according to the judge's notes, counsel for the appellants made these points:—

"Fraud must be proved. Each particular act of fraud must be proved. Fraud cannot be inferred."

No authorities are recorded as having been referred to either in the submissions or in the grounds of judgment, but the question of the standard of proof required was argued before this court, and reference made to *Nederlandsche Handel-Maatschappij N. V. v. Koh Kim Guan* ⁽¹⁾ and *Hornal v. Neuberger Products Ltd.* ⁽²⁾ and it was accepted on both sides that these authorities correctly laid down the law applicable. In the English case and in the case of *Bater v. Bater* ⁽³⁾ various expressions have been used to indicate that an allegation of fraud in a civil case must be proved to a high degree of probability, as Denning L.J. put it in *Bater v. Bater* ⁽³⁾ "a degree of probability which is proportionate to the subject matter" or "commensurate with the occasion". In the Singapore case, at page 175, Rose C.J., after reviewing the authorities, sums up the position in these words:—

"Whatever the precise formula adopted and whatever the theoretical position may be, it has long been the practice in countries where the English system of law operates for the courts, in civil cases, to require a high standard of proof in cases where fraud is alleged."

I propose to apply that standard in considering whether there was sufficient evidence to support the finding of fraud. As the judge has not referred to the standard of proof required, I can only assume that he has applied in his own mind to all the issues of fact in this case the standard that is usual in civil cases where there are no allegations of fraud and that he has not borne in mind what Rose C.J. refers to as the "high standard of proof" required in his consideration of the particular issue of fraud. To this extent, the judge has misdirected himself on the law applicable in this case. However, as there is no challenge of the finding accepting the plaintiff's evidence and the issue of fraud is to be determined only by inference, this court is in as good a position as the trial judge was to apply the proper test now and determine whether there has been the requisite "high standard of proof" of fraud.

It is also necessary to observe that, in its

A pleadings, the respondent made no allegation of fraud against the first appellant. The allegation was that this appellant was liable for the fraud of the second appellant because the latter, when committing the fraud, was acting as the agent of the first appellant. That this was the basis of the respondent's claim is confirmed by the judge's note of the closing submissions made by counsel for the respondent to the following effect:—

C "Pleadings — not pleaded fraud by 1st deft. — but by 2nd deft. Fraud on the part of agent is fraud on the part of principal, if fraud is found both defendants liable for \$160,000 jointly and severally."

D Nevertheless, the judge, in his grounds of decision, expressed himself as satisfied from the evidence that the second appellant, with the knowledge of the first appellant, knowingly and deliberately showed Bush the wrong area. It is therefore necessary to consider the finding of fraud against the first appellant also.

E The facts disclosed by the evidence given for the respondent, which was the evidence accepted by the trial judge, do not need to be set out at length. Those aspects which bear on the question of fraud will, of necessity, have to be considered in considerable detail in the course of reviewing the finding on that issue.

F That evidence is to the effect that the area covered by the approved permit exceed three square miles in extent and was situated in a jungle area of which no proper surveys were available, although there would be "bench marks" from which an approximate position could be determined. The correct area is approached from the same track as the area shown by the second appellant and both areas are to the east of this track. Both areas had common physical features. The areas were about three miles from one another. When Bush reported back to the company's chief geologist, one Cochrane, the latter went with second appellant to the Mines Office to check the issue of the prospecting permit. Cochrane, who has studied map reading, was able to determine from the sketch plan attached to the approved application that the area Bush had described to him (Cochrane) "was approximately the area shown in the sketch map". Second appellant had taken a copy of the sketch map to locate the area on the day he had taken Bush to inspect it.

I From this description of the locality and the actual area, it is obvious that a mistake might easily be made as to the precise area. The company's chief geologist (Cochrane) made the same mistake when checking at the Mines Department, although he was under the disadvantage of having only a verbal description from Bush of the area actually visited and had

not been there himself. Cochrane also tried to find the area on his own, but was unsuccessful. I can find nothing in this aspect of the evidence to suggest more than that the second appellant may well have made an innocent mistake.

The respondent, however, relied on certain features of the second appellant's behaviour some of which certainly raised suspicion. It was respondent's case that these features established not only suspicion but, when taken together, fraud according to the accepted standard of proof. It is necessary to examine these features in detail and, in some respects also, the behaviour of the first appellant which was also relied upon to a certain extent.

According to some of the answers second appellant gave to Bush during the inspection of the area, second appellant had been to the area before and therefore had had a better opportunity to ascertain where the correct area was. Even so, on its own, this point does not seem to carry the allegation of fraud any further, although it must be considered along with the evidence of Bush to the effect that second appellant said he had been beyond a certain point and there was no iron ore beyond that point, whereas Bush, on a later visit, found that the ore deposits did continue further on and, what was more important, "about" four hundred yards further on, the respondent company's surveyor located a bench mark the identification of which would have enabled a person (and did enable Bush) to determine from Survey Department maps that the area inspected was not the area in the sketch plan. Bush does not suggest that appellant stopped him from going on. His evidence is to the effect that Bush himself asked whether there was more ore beyond the point they had reached. From appellant's reply and the presence of the bench mark, respondent claims the court should infer that appellant was deliberately dissuading Bush from going towards the bench mark, because it would then be found that the wrong area was being inspected. There is, of course, no evidence that anybody concerned knew of the existence of the bench mark, or even that second appellant was aware of its importance. At best, in my opinion, this piece of evidence may raise suspicion. Clearly, on its own, it does not reach a high standard of proof of fraud.

There must be added to this the evidence that Cochrane endeavoured to get second appellant to take him to the area for a second inspection. Cochrane's evidence on this aspect is to the following effect:—

"2nd deft. told me he would have to ask the owner about this. He then went away and returned soon afterwards and told me that the owner was not willing that I should visit the area because the owner had already

A given the opportunity to us to inspect the area once and this was sufficient. I suggested to 2nd deft. that he could take me to the area without the owner's permission. 2nd deft. did not like the idea at all. I said it was essential if we were to proceed with the matter. 2nd deft. said that he himself did not know the exact tracks that led to this deposit and he would have to get a guide from Temerloh. 2nd deft. went off to get the guide. 2nd deft. came back later in the day and said he had seen the guide but the guide had refused to go without the owner's permission. 2nd deft. further told me that the guide had telephoned the owner and that the owner was very annoyed and had forbidden the visit."

B It is to be noted that this evidence indicates that second appellant did go off twice, ostensibly to endeavour to arrange for a second inspection and that, on the occasion of the first visit, the driver of the vehicle was a Chinese from Temerloh who had worked with "the owner" of the approved application who had been a timber contractor and had learnt of the deposits during timber operations. This driver went with Bush and second appellant when they left the vehicle and proceeded on foot to the area. It is not an unreasonable inference that he was there as a guide on the first occasion and second appellant's explanations to Cochrane therefore have a ring of truth. However, the fact remains that he did not arrange the second visit and this also may be regarded as an element giving rise to suspicion.

C Another aspect stressed as strengthening the inference of fraud was that both appellants lied about simultaneous negotiations with Japanese mining interests. For the respondent, it was submitted that this amounted to no more than a means of boosting the terms in first appellant's favour. There was no doubt the respondent did increase its terms, no doubt partly because of the supposed value of the deposits, but no doubt also partly in order to outbid their supposed competitors. Methods of persuading the opposite party to a bargain to pay more are many and this method is not an uncommon one. I should have thought that it was very poor evidence in support of a charge of fraud in relation to the identity of the subject matter of the contract. It does, however, suggest that the appellant might use dishonest methods and also that they endeavoured to have the transaction completed quickly, although there are other features to consider in regard to this aspect of speedy completion. At most, this untrue talk of competitors can only give rise to suspicion.

D Much was made of the rejection of Kuala Lumpur cheques on the basis that the evidence did not suggest that these cheques were rejected because of any urgent need for money. The evidence which was accepted by the judge, shows that first appellant, who was the first to refuse a Kuala Lumpur cheque, stated that he did not have a bank account. See Bush's evidence. The cashing of a crossed cheque drawn on a bank

in a city over a hundred miles away in an entirely separate part of the country can, as experience proves, be a very difficult operation, if the payee does not have a bank account. These difficulties would undoubtedly be greatly increased if the cheque is for a large amount. Quite obviously, the first appellant might justifiably doubt whether anyone other than the respondent company in a town the size of Kuantan would be able, or willing, to cash it for him and he might well have to trust someone else with the cheque and his money until the cheque was cleared with the Kuala Lumpur bank. There would be further — perhaps insuperable — difficulties if the crossing was marked “not negotiable” or “account payee only”. It is not possible to live in small communities in the Far East without having personal experience of the difficulties crossing cheques create for many members of the community, including men in business in a small way, who do not normally have bank accounts. For the problems created so often recoil on the drawer of the cheque. It should not be a surprise to anyone with any business experience in rural areas that a timber contractor, who would probably have some experience of these difficulties, refuses a crossed cheque on an outside bank because he has no bank account. The first appellant having refused to accept this cheque, it is not surprising that the second appellant also refused. I find it impossible to consider this incident as strengthening an inference of fraud, more especially as there is no allegation of fraud against the first appellant, who first raised this objection.

It was submitted also that the attitude of the first appellant when the truth was discovered, showed he knew the truth all the time, because he evinced no surprise. I repeat no allegation of fraud was made against the first appellant. In addition, this proposition should be tested by a detailed examination of the evidence on this point. Bush’s evidence of what he did after discovering that the area he and first appellant had inspected was not within the permit area, is as follows:—

“When I found out it was the wrong area I stopped the prospecting arrangements. By that time P.W.1 (i.e. Cochrane) had gone and I had replaced him. Immediately on my return from the area I attempted to contact both defts. I left messages at 2nd deft’s house asking both defts. to come and see me in my office. I did not say why I wished to see them. After a lapse of about 2 weeks when I failed to contact them I wrote to 1st deft. c/o 2nd deft’s house. Neither of the defts. came to see me. I managed to contact 2nd deft. by telephone and I told him why I wished to see him. About 2 weeks later 1st deft. came to my house on a Sunday. I told 1st deft. that the area which 2nd deft. had shown me was not the area in C. 1st deft. appeared to be completely indifferent. He did not show any signs of surprise or worry. I said that as we had acted in good faith in this matter he should return the money to us. 1st deft. said he would not and could not as he had

A spent the money. I asked him if he had acted in good faith would he not apply for the actual area we had seen. 1st deft. said he was not interested in doing this. He asked me if I was certain that the area in C was of no value. I replied that I was not certain of the area in C because at that stage to my knowledge no one in my company had been to this permit area. I then had an inspection made of the area covered by C. Inspection revealed that the area covered by C was worthless.”

B Three points emerge. First appellant came voluntarily to see Bush, although he must have known before he came what Bush wanted to see him about. As he knew about it beforehand, it is hardly to be expected that he, a Chinese, would show as much emotion as a European who had just heard the news. As a result of an enquiry from first appellant, the interview included a discussion as to whether the correct area might be of any value — hardly the kind of enquiry to be expected from one who knew he had disposed of worthless mining rights by fraudulently purporting to sell valuable rights. Again, I find difficulty in concluding that this account of the interview gives any support to the allegation of fraud because of the behaviour of first appellant.

C The other features referred to on behalf of respondent hardly warrant detailed examination. The fact that second appellant did not tell Cochrane on the first interview where the land was, or who the owner was, does not seem important, especially as Cochrane’s evidence does not suggest he asked for this information. The point that first appellant took no steps to enforce the agreement to prospect was easily met by the fact that the agreement gave respondent a right to abandon the land at its own discretion. Clearly he could not have proceeded very far with any proceedings to enforce the agreement once the company had found the land concerned was not even worth prospecting.

D There is no doubt appellants must be considered to have given false evidence in some respects if the evidence given by respondent’s witnesses is accepted. However, although this may show that they are unreliable, it does not give any positive support to the allegation of fraud. Some of this evidence may well have resulted from the fact that at that stage they were fighting to retain the money that had been paid to them rather than that they were endeavouring to conceal fraud. Better educated persons well versed, or well advised, in the law would no doubt avoid this pitfall, which probably led to the judge refusing to accept their evidence at all. As evidence of fraud at the time the parties were bargaining, it has little value in the overall picture disclosed by the evidence in this particular case. If there had been any direct evidence of facts which, if established, must point to fraudulent conduct and the false evidence was relevant to that evidence, the giving of false

evidence in those circumstances would be very material. In this case, I can find no direct evidence of facts clearly pointing to fraud.

I find therefore little to support the allegation of fraud in any of the features referred to on behalf of the respondent. Even taking all these features together, I find no more than suspicion, or dishonest behaviour, but nothing that I can feel leads to proof of the fraudulent conduct that is alleged, bearing in mind that the onus is on the respondent to establish this allegation to a standard that is commensurate with the serious nature of the charge.

I have dealt so far only with those features of the evidence that it was submitted supported the judge's finding. There are other features to which I should refer.

Both appellants were obviously permanent residents in the district. The second appellant had longstanding and continuing business relationships with the company, a very good association to have with a company whose importance and standing in the mining industry was emphasised by its counsel. The first appellant was a timber contractor in the district and a justice of the peace, all indicating that he is a well established resident. Both, with their knowledge of operations in forest areas, would know that a fraud of this nature would be discovered as soon as the company began operations, and that then there would be much trouble for both of them and a loss of the business connection for the second appellant. There is no evidence that either appellant endeavoured to disappear, even keep out of the way when the respondent company discovered their mistake. All these features make it less likely that the proper inference to be drawn from the talk of Japanese competition and the refusal of crossed cheques is that the appellants were endeavouring to force a speedy completion because of their fraud, or indeed, that they had any guilty knowledge at all.

That some speed was necessary is evident from the fact that the application for a prospecting permit was approved on 6th March, 1961, on terms that required the permit to be taken out within three months and a deposit of \$7,000 to be paid before it could be taken out. Nearly half the period had expired when second appellant first approached the respondent.

Finally, after the alleged fraud was perpetrated, the first appellant still co-operated by obtaining a formal power of attorney from his nephew in England and obtaining from him a formal appointment of respondent company as the engineers. Such evidence is more consistent with lack of knowledge of fraud than with the suggestion that the company was stampeded into paying over cash quickly because the appellants

A were aware that fraudulent conduct on their part might be exposed at any time. It is also to be noted that first appellant eventually accepted little more than half the down payment which he originally demanded from respondent company in return for larger royalties, which, if he was party to the alleged fraud, he must have known he would never receive. No doubt, the down payment still remained a large sum, but it is not possible to review the evidence on an allegation like this without paying whatever attention is appropriate to features that may point in the other direction.

C All in all, I consider there was not sufficient evidence to support the finding of fraud against either appellant and consequently there can be no rescission on the ground of fraud, and the award of damages for fraud should be set aside.

D There was undoubtedly misrepresentation, in that the second appellant represented to Bush that the area inspected was included in the approved application. On behalf of both appellants, it was submitted that the respondent company could, by the exercise of ordinary diligence, have discovered this mistake before entering into the formal contract. That contract was concluded about ten days after second appellant first spoke to Bush about this proposition. It was four days before the agreement was signed that first appellant was first brought to Cochrane's house. In the meantime, Cochrane had endeavoured to get permission to visit the area again and had been refused permission. F The company made no further effort to visit the area and it is obvious from the evidence that, from then on, they had decided to conclude this agreement without any further check, although a mining company of this size has the facilities for making proper checks of an area and its boundaries, including surveying facilities, and although a survey was necessary (and was done) before any prospecting could be done. The director of the company (Harris) told the chief geologist (Cochrane) that "it was unusual for a large sum to be paid out before any prospecting had been done" and asked Bush to eliminate the capital payments, and balance them by increasing royalty payments. After further negotiation carried on by Cochrane, Harris was still unwilling to consider cash payments and thought Cochrane should try to obtain more geological information. It was at that stage that H Cochrane endeavoured to arrange a second inspection and second appellant told him first I appellant would not co-operate. There is no suggestion that first appellant owned this land. His principal had merely applied for a prospecting permit over it. Nevertheless, at least four days before the contract was signed and the cash paid over, the decision was taken to pay these

large sums without any further check. After the agreement was concluded, apparently without any further information than had originally been obtained from second appellant and the Mines Department records, a surveyor was sent out to look for a bench mark and immediately the error was discovered.

This record of events shows beyond all doubt that this substantial company had the facilities for checking the position at any time and that its executive officers realised the risk that was involved in taking the unusual course of entering into a contract on these terms without a further check. It is plain that the company "had the means of discovering the truth with ordinary diligence" to quote the words of section 19 of the Contracts Ordinance, 1950. It is equally plain that the circumstances, involving these large payments, called for the exercise of more than ordinary caution. The truth of the matter is that the respondent company's officers, fully appreciating the danger, decided not to make use of the facilities available, but to take the risk.

It was contended for the company that it was stampeded into this decision by the talk of the offer from Japanese sources. That talk may have persuaded them to take the risk, but they still decided to take it. There has been no allegation in the pleadings that it was this aspect that induced the company to enter into this agreement. Obviously, it was the result of the inspection that led the company's officers to this decision, and they did have the means of discovering with ordinary diligence the truth concerning this aspect, even though, in consequence of the fear of losing these mining rights to Japanese competitors, they decided to proceed without using the means available to them.

For these reasons, in my judgment, the contracts entered into between the respondent company and the appellants were not voidable because of misrepresentation and the company's claims against both appellants entirely fail.

In view of this conclusion, it is not strictly necessary for me to decide whether second appellant was acting as the agent of first appellant or not. I feel bound to observe, however, that, on this issue also, the onus lay on the company and that the more cogent evidence (the existing relationship between the company and second appellant, as shown by Exhibit D.3, and the payment of the latter's commission by the company) points to him being the agent of the company. These features carry more weight in my opinion than the features pointed to on behalf of the respondent company, viz. that the first appellant, on the occasion of the signing of the contract, seemed "at home" in the second appellant's house and that the latter was not a paid

A employee or retainer of the company. He made it clear to Cochrane at an early stage of negotiation that the company must pay him, as he was getting no reward from the first appellant. On this evidence I do not consider that the respondent company discharged the onus that lay on it to establish on a balance of probabilities that the second appellant was the agent of the first appellant in negotiating this contract.

B I would allow this appeal, set aside the judgment of the court below and substitute judgment in favour of the appellants on all claims with costs to the appellants both on the appeal and in the court below.

C Tan Ah Tah F.J. concurred.

Appeal allowed.

Solicitors: R. R. Chelliah Bros.; Richard Talalla; Skrine & Co.

GOH SENG THIAM v. LEE & THE CEYLON SPORTS CLUB

[F.C. (Barakbah C.J. (Malaya), Wylie C.J. (Borneo) and Tan Ah Tah F.J.) November 19, 1964]

[Singapore — Federal Civil Appeal No. 30 of 1964]

Contract — Building contract — Construction of club house — Delay in completing construction — Novation of contract — Guarantee — Amendment of statement of defence — Inaccurate affidavit of documents — Procedure.

Practice and Procedure — Amendment of statement of defence.

F The Ceylon Sports Club, the 2nd respondents, entered into a contract on November 25, 1952 in writing with the British Construction Company for the construction of a club house at Balestier Road, Singapore. The club engaged Lee, the 1st respondent, as their architect. There was delay in completing the construction and Lee gave notice to the British Construction Company, to cease work on the contract. The appellant claimed that there was a novation of the contract with the consent of the Ceylon Sports Club and the British Construction Company; that thereby the British Construction Company was to be discharged from further liability under the contract and the appellant was to be substituted for them. It was also claimed that the first respondent had agreed to make all payments due to the appellant on the default of the second respondents. The defence denied the alleged novation and the agreement to make the payments due and alleged that when the British Construction Company ceased work under their contract, various contractors and workmen were engaged to complete the work which was outstanding; and that the appellant was engaged by the first respondent to do certain work for which he was paid in full. The trial judge held that there was no novation and dismissed the claim. The appellant appealed. The main ground of appeal was that the trial judge was wrong in holding that there had been no novation. Two questions of procedure were also raised on the appeal. It was alleged that the trial judge had erred in law in allowing the amendment of the defence after commencement of the trial; and in admitting a document not disclosed in the affidavit of documents, especially when an application for an adjournment to consider, evaluate and challenge such evidence was refused.